

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

74-2457

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P/S

United States Court of Appeals

For the Second Circuit.

SAMUEL H. SLOAN,

Petitioner,

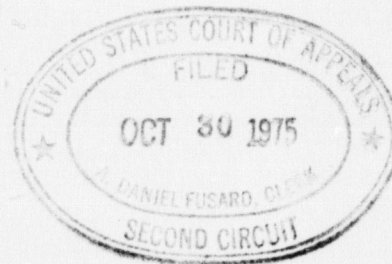
-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR REHEARING AND REHEARING EN BANC

SAMUEL H. SLOAN
Petitioner
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SAMUEL H. SLOAN,

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74-2457

-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent.

PETITION FOR REHEARING AND REHEARING IN BANC

PLEASE TAKE NOTICE that the undersigned hereby petitions this court for a rehearing or a rehearing in banc of the Per Curiam opinion of this court dated October 15, 1975. In the event that this petition is denied petitioner moves that the mandate be stayed pending application to the Supreme Court for a writ of certiorari.

STATEMENT OF THE CASE

In the petition for review the petitioner seeks a declaration that the consecutive suspensions of trading in Canadian Javelin Ltd. ("CJL") are invalid and unconstitutional. Although CJL is the only security involved in this proceeding, petitioner in his brief points out that the S.E.C. has suspended trading in 28 securities in which Sloan dealt or was a market maker and that Sloan has sued the S.E.C. on this account. See Sloan v S.E.C. SDNY 74 Civil 2792 U.S.C.A. docket no. 75-7283. In addition, the S.E.C. has sued Sloan for filing "listing applications" for approximately 300 securities after an S.E.C. suspension of trading was terminated. See S.E.C. v

Sloan, S.D.N.Y. 74 Civil 5729 U.S.C.A. docket no. 75-7056. For this reason, Sloan seeks a declaration that all summary suspensions of trading are unconstitutional.

The brief filed by the petitioner contains nine points as follows:

- POINT I. This Controversy is Not Moot.
- POINT II. The S.E.C. Abused its Discretion in Ordering that Trading in Canadian Javelin Ltd. be Suspended.
- POINT III. The Orders of Suspension of Trading Are a Legal Nullity Because they are Unsigned by any of the Securities and Exchange Commissioners.
- POINT IV. The Securities & Exchange Commission Violated Sections 15(c) 5 and 19(a) 4 of the Exchange Act by Suspending Trading for a Period Greater than Ten Days.
- POINT V. Sections 15(c) 5 and 19(a) 4 of the Exchange Act, which Provide that the S.E.C. is Authorized Summarily to Suspend Trading in any Security, are Unconstitutional.
- POINT VI. The Existence of an Independent Regulatory Agency such as the Securities and Exchange Commission, which is not Part of the Executive, Legislative or Judicial Branches of the United States Government but which Possesses the Combined Powers of all three Branches of the Government, is Repugnant to the Constitution.
- POINT VII. This Proceeding, which is Authorized by Section 25 of the Exchange Act, Deprives the Petitioner of his Constitutional Rights in that it does not Provide for Judicial Review of Orders of the Securities and Exchange Commission and it Deprives the Petitioner of the Right to a Hearing in a Court of Law.
- POINT VIII. The Petitioner is Entitled to the Recovery of Costs Because Section 27 of the Exchange Act, which Provides that no Costs may be Assessed for or Against the S.E.C. is Unconstitutional.
- POINT IX. Since Sections 15(c) 5, 19(a) 4, 25 and 27 of the Exchange Act are Unconstitutional, the Entire Act is Unconstitutional.

In response the S.E.C. advanced the following contentions:

- I. This petition for review is not properly before this Court.
 - A. The issues presented by the petition for review are moot.
 - B. Petitioner lacks standing to seek judicial review of the Commission's orders in question.
 - C. Petitioner has failed to exhaust his administrative remedies.
- II. The creation of the Securities and Exchange Commission and the delegation to it of rulemaking and other powers including the authority to suspend trading in the securities markets are a valid exercise of the power of Congress to regulate interstate commerce.
- III. The Commission did not abuse its discretion in ordering the suspensions of trading in the securities of CJL sought to be reviewed.

The Per Curiam opinion of this court dated October 15, 1975 did not grant Sloan the relief requested. At the same time, the opinion is no cause for celebration at the offices of the S.E.C. particularly since it decided Sloan's argument advanced in Point IV of his brief not to be frivolous.. It also decided that Sloan had standing to seek review of the S.E.C.'s orders of suspensions and that these orders would be subject to further judicial review. However, having decided these two critical points favorably to Sloan it dismissed the petition without prejudice on the rationale that the record before it was insufficient to decide the substantive issues involved. However, the Per Curiam opinion made it clear that the S.E.C. was to give Sloan the opportunity for "some sort of hearing." Sloan has since applied to the S.E.C. for a hearing but no response has yet been forthcoming from the S.E.C.

REASONS FOR WHICH THIS PETITION SHOULD BE GRANTED

At the outset it should be stated that even though Sloan is now attempting to pursue the administrative remedy supposedly made available to him, that should not prohibit this court from further consideration of the issues involved particularly since, it is submitted,

the right result has not been reached. Civil Aeronautics Board v Delta Air Lines 367 U.S. 316 (1961). Furthermore, it is highly doubtful that an administrative remedy is available. In fact, at the outset of oral argument Counsel for the S.E.C., Michael J. Stewart, asserted that Sloan did not have an administrative remedy and that no hearing would be available. As oral argument progressed, however, it became more and more clear that the Court considered Mr. Stewart's position to be legally untenable. At some point, when it became clear that the S.E.C. would otherwise lose this case, Mr. Stewart capitulated and indicated that the S.E.C. would be willing to grant a hearing to Sloan.

Whether this concession was authorized by the S.E.C. is not clear. In any event, Sloan has now written to the S.E.C. and has demanded a hearing. What the response to this demand will be is not yet known. It is possible, however, that the S.E.C. will simply ignore Sloan's demand. It did so previously when Sloan wrote a letter dated August 10, 1973 requesting a hearing regarding CJL. In that instance, the S.E.C. did not respond either in writing or orally to Sloan's request. If the same result occurs here Sloan will have no recourse. The instant proceeding will have been dismissed and there will have been no other proceeding of which Sloan can seek review. It should be noted that this court has only the power to review "orders" of the S.E.C. A failure to respond to a letter is probably not a reviewable order. Thus the Per Curiam opinion of this court puts the S.E.C. in the position where it can frustrate all judicial review of orders of suspension of trading. It is this result that the S.E.C. was obviously seeking in advancing arguments such as "lack of standing" and "mootness."

The Per Curiam opinion enables the S.E.C. to frustrate judicial review in other ways. It can simply delay and procrastinate in setting the matter down for a hearing and in reaching a decision. It did so In the Matter of Samuel H. Sloan, Adm. Pro. file no. 3-3680, U.S.C.A. docket no. 75-4087 which took the S.E.C. three years and four days to decide. The same result occurred in an administrative proceeding discussed in Koss v S.E.C. 364 F. Supp. 1321 (S.D.N.Y. 1973) where Judge Bauman observed that the S.E.C. had displayed much "foot dragging" in connection with its own administrative proceeding. Ultimately in that case the administrative hearing was not held until more than two years after the administrative proceeding had been commenced.

However, the Per Curiam opinion of the court is erroneous in a more fundamental respect in that it is based upon a misstatement or misapprehension of the law. Footnote 1 states that the recent Securities Acts Amendments of 1975 "gives the S.E.C. the new power to suspend trading in a stock for up to one year, after notice and a hearing." This is not the case. The section in question, §12(j), only gives the S.E.C. the power to suspend the registration of a security. Furthermore, this section is not new. The S.E.C. has always had the power to suspend the registration of a security. Previously, this power existed in §19(a)(2) of the Exchange Act, 15 U.S.C. 78s(a)(2). In the Securities Acts Amendments of 1975 Congress merely moved §19(a)(2) over to become the new §12(j).

This misapprehension of the law was no doubt due to the fact that in footnote 12 of its brief the S.E.C. somewhat misrepresented the manner in which the law had been changed. It should be said here that Sloan's brief was dated May 27, 1975 whereas the new law was not passed until June 4, 1975 and the misapprehension in question was not due

to any neglect on the part of Sloan. In any event, the Securities Acts Amendments of 1975 did change the relevant provisions of the law in two respects:

1. It gave the S.E.C. the power summarily to suspend all trading on any national securities exchange. §12(k).
2. It prohibited any broker or dealer from effecting any transaction in any security the registration of which has been suspended or revoked. §12(j).

Section 12(j) would seem to be irrelevant for purposes of this proceeding except that in footnote 3 the court's opinion re-emphasizes its misapprehension that §12(j) gives the S.E.C. the power to suspend trading in a security for up-to-one year after notice and a hearing. This misapprehension explains the decision of the court which has the effect of directing the S.E.C. to give Sloan a hearing even though the statute itself does not make a hearing available. It should also be said that the S.E.C. has, since 1934, had the power to suspend the registration of a security after notice and a hearing and, as far as petitioner is aware, has never exercised this power. It is obvious that the S.E.C. would prefer to suspend trading in a security for 37 consecutive ten day periods without a hearing rather than suspend the registration of that security for one 365 day period where a hearing is available.

In National Cable Television v United States 415 U.S. 336, 354 n 1 (1974) the dissenting opinion of Mr. Justice Marshall quoted one authority who said:

"Lawyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests."

That point illustrates another infirmity in the Per Curiam opinion because Sloan is being asked to seek relief which is potentially harmful to his interests. Sloan's interests lie in permitting the securities of CJL to trade freely and in putting the S.E.C. out of commission. The decisions in Edwards & Hanly v Sloan 48 A D 2d 644 (1975) and S.E.C. v Canadian Javelin Ltd. 64 F.R.D. 648 (S.D.N.Y. 1974) may provide some illumination on this point although both decisions are being appealed and neither provide a complete or an accurate statement of the reasons for which Sloan continues to pursue this matter. However, by demanding that the S.E.C. conduct a hearing Sloan opens up the possibility that, at the conclusion of this hearing, the S.E.C. may decide to suspend the registration of CJL for one year. This would put Sloan in a far worse position than he presently finds himself. In addition, Sloan's brief makes it clear that he considers the Administrative Procedure Act as applied by the S.E.C. itself to be unconstitutional. The S.E.C. may well interpret the Per Curiam opinion of this court as authorizing the S.E.C. to create a new judicially approved administrative remedy where one presently does not exist by statute or rule. The result would be a vast expansion in the power of the S.E.C. which is precisely the opposite result from that which Sloan is hoping to achieve.

The Per Curiam opinion is also illogical in that it dismisses the petition because of the inadequacy of the record while overlooking the fact that the record is inadequate because of action or inaction by the S.E.C. Certainly it is not Sloan's fault that the record is "insurmountably sparse." A few facts on this point are appropriate:

The petition for review was filed in early November, 1974. Although the S.E.C., by statute, has 40 days to file the record, it did not do so timely and then filed only a certified list of the documents which constitute the record. Sloan moved for an order requiring the S.E.C. to file the documents themselves. While this motion was pending, the S.E.C. filed the actual documents, which was fortunate because the motion itself was denied. The documents were received on February 13, 1975.

The documents consisted of excised memorandums. None of the documents were signed. Two (App. 32-33) consisted of a blank sheet of paper. All parts which the S.E.C. did not want the court to read were blanked out.

For this reason, Sloan moved for an order requiring the S.E.C. to file the full memorandums. The S.E.C. opposed this motion on the grounds that the memorandums were "intra-agency documents" and therefore were privileged. Again this motion was denied.

Finally, Sloan filed his brief. The S.E.C. requested an additional two weeks to file its opposing brief. This motion was granted and further delay resulted. After final briefs were filed, this matter was set down for oral argument fairly promptly but by the time the argument was held more than ten months had passed since the date of the original petition for review. Now the court finds, in effect, that the record is stale and that it wants a new record. It is submitted, however, that the problem does not lie in the inadequacy of the record. Because of the ten day nature of suspension orders, the record in this proceeding will never reflect the reason

for the current suspension, unless the court is able to decide the matter with unusual speed and unless the S.E.C. departs from its practice of waiting the full 40 days to file the record. Therefore, this proceeding is one which is "capable of repetition, yet evading review" unless the court is willing at some point to decide the case based upon facts which no longer exist. Southern Pacific Terminal v ICC 219 U.S. 498, 515 (1911); Roe v Wade 410 U.S. 113, 125 (1973).

There are at least two superior ways in which this court could achieve the result it seems to desire. One would be for this court to retain jurisdiction while Sloan seeks relief from the S.E.C. If relief is not forthcoming fairly promptly this court could reconsider the matter. Among other things, this course would spare Sloan the expense of paying a new docket fee and filing new briefs and new appendices to make points he has already made. The second course would be to refer this matter to the district court. The court which decided this case may have overlooked a provision of the new §25(c)(3) which gives this court the power to transfer the instant proceeding to any district court of the United States "for the convenience of the parties and in the interest of justice." Since the district court would have the power to conduct hearings and to perform various fact finding functions, it would be in a much better position to decide, at least initially, the issues involved in this case. Therefore this proceeding should be transferred to the district court. There is no rationale for the S.E.C.'s presumed argument that it is better to have an S.E.C. administrative law judge decide this case as opposed to a United States district judge. In fact it is fairly obvious that an S.E.C. administrative law judge would not provide a

fair and impartial tribunal. See Withrow v Larkin 421 U.S. 35, 47 (1975). The possibility that an S.E.C. administrative law judge will decide that the actions of his superiors were illegal is so remote that a requirement that Sloan proceed before such an administrative law judge is constitutionally impermissible. Id. In addition, it is hardly just that Sloan has been required to spend nearly \$650 in printing and docket fees alone not to mention the time and effort involved in this petition only to be told that he must pursue an administrative remedy which did not even exist until nearly the end of oral argument.

A rehearing in banc is appropriate because this proceeding involves a question of exceptional importance. On November 20, 1974 the S.E.C. suspended trading in American Telephone & Telegraph Co. and on January 24, 1975 the S.E.C. suspended trading in International Business Machines Corp. Thus, the S.E.C.'s power of suspension has adversely affected the property rights of millions of investors. CJL alone has approximately 12,000 stockholders in the United States. Therefore, the question of whether the S.E.C. can, under the constitution, summarily suspend trading in CJL or any other security is a matter of exceptional importance.

CONCLUSION

For all of the reasons set forth above the petition for rehearing and rehearing in banc should be granted.

DATED: October 23, 1975

Respectfully submitted,

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804 384-1207

Robert V. K...

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Oct 1975 deponent served the within Brief upon: *Diarmuid J. Holcomb*
Samuel Taylor

attorney(s) for *Reed*

in this action, at *99 Park Ave* *500 W. 11th St*
NYC *Washington DC*

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

[Signature]
Robert Bailey

Sworn to before me, this 30
day of Oct, 1975

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976